

The Treaty and Democratic Government

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Introduction

This is the first of a series of articles exploring current implications of the Treaty of Waitangi for New Zealand governance. Here, the objective is to locate the persistent Maori demand for some form of self-government in its democratic context of government-by-consent. The argument is that the issues are not *conceptually* difficult. In particular, fears about 'sovereignty' are unwarranted. The current burst of activity in 'Treaty negotiation' is not a threat to New Zealand's democracy, but a sign of its strength – a positive *and expected* part of the constitutional system. As in any democracy, however, there are legitimate questions about the framework within which such negotiation takes place and its limits.

Self-determination is a major theme across human history and across cultures. All societies have had to negotiate and fight their way through the changing relativity of authority between self, family, group, tribe, nation and empire. In the New Zealand context, this pattern predates European settlement - witness the ebb and flow of authority amongst the Polynesian groups who sailed to these islands. Post-1840, self-determination was the key theme in the attainment of self-government and eventual independence from Britain.

The distinctive characteristics of the New Zealand experience lie in the unique language, history and present role of the Treaty. Perhaps this obscures the fact that the issues raised in the "Treaty debate" reflect similar problems of governance everywhere. The argument presented here therefore locates the particular challenges of the Treaty in a broader democratic context - namely that *all governments face limits to their power*. Quite simply, this should dispose of the notion that 'sovereignty' issues form an insuperable barrier. It is then possible to see self-determination questions as part of an ongoing

negotiation of relative degrees of autonomy, within a system based on government-by-consent.

The limits to all claims of power

Across history, the limits to power have always been the subject of debate, political action, war, and, more recently, constitutionalism. How far can a particular minority assert its distinctiveness and not become too divisive, perhaps bloody, for society as a whole? How far can a majority assert its numerical, cultural or other dominance without crushing the distinctiveness of smaller groups? What are the limits of domination, and of resistance to such? In the fast-churning washing machine of today's world, with accelerating movement of peoples, economies and cultures, what is the 'right to self-determination'? Put differently, are there limits to both 'majority rule' and 'self-determination' where distinct communities live together?

The New Zealand version of these questions can be briefly stated: what are the limits in the 1840 Treaty of Waitangi, implicit in the juxtaposition of national powers of governance in article 1, the Maori/tribal powers of self-rule in article 2, and the rights of equal citizenship in article 3?

The proposition that there must be limits to all human conduct, and certainly to the assertion of a 'freedom' or 'right' of any description, is relatively simple. The fact of living together requires that *any* claimed right is limited by the rights of others. This provides limits everywhere, from personal choices (like sexual partnerships, or where to live) to claimed rights to speech, movement, association, political activity, and the use of property, for example.

The notion that there are limits has not of course stopped people or governments *claiming* absolute powers or rights – or even *exercising* what looks like absolute

power for a period if backed by sufficient force to crush objections. But over-riding dominance is always temporary (though the night may at times be long for individuals or peoples subject to such). Louis XIV's claims to absolute power and the Divine Right of Kings was a good line, but it soon seemed just silly. The Orwellian power behind the Iron Curtain had some limits in the Communist Party system, it was certainly contested and, under myriad pressures, it could not last.

To an intuitive argument that there must be limits arising from the fact that other people have rights too, one thus might add centuries of history, philosophy and countless court cases affirming the limits on human claims to absolute rights. A simple illustration of the general point lies in the ongoing exploration of what some have claimed as virtually absolute powers of private owners to do what they like with "their" private property. The answers are the same: ownership is not absolute; there are limits on one's actions arising from the fact of community.

There is thus no difficulty in principle with the notion that *all* rights are restricted by the rights of others – the questions are rather what is reasonable and fair, and what particular balance might apply at a point in time.

One law for all...

The same argument applies to another conceptual blockage. The undisputed importance of all citizens being 'equal before the law' should not suggest that there is in any sense 'one law for all'. A multiplicity of laws apply to people in different circumstances, every day. Directors of companies have laws that apply only to them, and not to other parts of the company; squash clubs have their own rules that do not apply to non-members; Maori tribes have laws that do not bind other Maori, let alone Pakeha. New Zealand, like every other society, lives with a plurality of laws within one umbrella legal system. Indeed, there is a multiplicity of specialist courts that apply those different laws.

The same argument applies to discrimination. Whilst it is unlawful to discriminate on some grounds in some areas of activity, there is constant differentiation elsewhere in both the law and public policy: only those over 65 get state pensions, only migrants pay significant fees to apply for a state service (permission to immigrate), only school children get certain dental

benefits, universities admit students on a number of grounds of differentiation, etc.

In reality, the legal system does not expect or guarantee exact equality, but something closer to relative fairness and relative protection, guided by standards that change as societies re-assess what is fair and just. Nevertheless, an overarching authority in the court system is important as a symbol of some sense of unity in all this diversity; this is now achieved ultimately through the Supreme Court in New Zealand. The point, simply stated, is that the rhetoric of 'one law for all' is just that.

"Sovereignty"

Let me set up starkly where the above discussion leaves us in relation to the New Zealand Parliament and self-government/*tino-rangatiratanga*. Any suggestion of 'sovereignty' meaning 'absolute power' is nonsense from first principles. Whatever the nineteenth century conceptualisation, no group of people meeting in a building (however grand and symbolic) has absolute power in practice, philosophy or law. The rubric of the sovereignty of the Crown-in-Parliament should thus be read much more simply as the (mostly) superior powers of governance. Governments operate within limits that come from politics, convention, parliamentary tradition, international law, fundamental rights, the law and from other important rules which society has endorsed in various ways.

The New Zealand constitutional system, therefore, emerges not with 'sovereignty' located in one institution, much less a person, certainly not in a symbol like 'the Crown', and not in any one or many dozens of scattered Maori tribes and sub-tribes. If by 'sovereignty' one means the ultimate power of decision-making, then that is surely shared in *processes* that reflect collective self-governance by all New Zealand citizens – more particularly, in their interactive negotiation as they deal with the power and resource issues of the day.

The word 'sovereign' of course carries its history from western European thinking as the concept of the state developed. That tradition came to see ultimate power as located or epitomised in the person and institution of the monarch: the Sovereign. And, in the Parliamentary tradition, as the reality of governance slid from the monarch to the monarch's advisers (the cabinet) drawn from elected representatives, it was easy to widen the location of supposed 'sovereignty' to

include those elected representatives. All this was very mystical. It continues today in the notion that responsibility for government resides in one eternal and ever-governing (and hence ever-defending) 'Crown', instead of 'the Government of the day', or 'the state'.

I suspect that if one today asked a random foreign observer, a modern Alexis de Tocqueville, to locate 'sovereignty' in the workings of New Zealand's democratic constitution, the result would be more practical than mystical. The heart of our governance is in government-by-consent. Parliament is a critical part of that, of course, hence the importance attached to the legitimacy cycle of elections-mandates-coalitions-tax-budget-accountability-elections. Bills passed by Parliament also trump, as law, the product of other governmental institutions. It is perhaps this 'legal superiority' that suggests to some that Parliament is all-powerful, and also that has led it to become a focus of authority in its own right rather than as part of government-by-consent.

Seeing sovereignty/tino rangatiratanga as process

It is not tenable to accept the notion that a New Zealand Parliament has unlimited power. Mostly, the limits are found in the heart of what makes the New Zealand constitution tick: an acceptance that 'the people' are the sole source of ultimate authority and that the questions of the day must be solved through government-by-consent. That consensus would, in almost all conceivable circumstances, provide limitations to what is done by any government and to what it requires of Parliament. But I have no doubt that in extreme circumstances the courts would simply strike down some parliamentary action as unlawful. The question is not, to my mind, one of principle, but of being able to recognize a 'really bad case'. If all sides note this possibility, that case might conveniently never arise, leaving all sides happy - albeit sometimes a bit huffy and puffy.

If Parliament is not an all-powerful despotic institution, there is similarly no unlimited 'right' to self-determination. Tino rangatiratanga (by any translation, including 'Maori sovereignty'), is thus a claim to self-rule with limitations. Most people probably understand the need for a tribe to see itself as standing eye-to-eye with the 'other side' in the Treaty relationship. But

there is abundant room in the negotiation process of this democracy for mana (here: appropriate respect, authority, dignity) to be accorded to all parties, including the times when government ministers and negotiators appear on tribal marae. Even on its own terms, the concept and practice of chiefly rule was never that of unlimited power. Mana always had to be earned and sustained, whatever the boost that noble birth might have given.

It is important to see our history in perspective. Over the centuries, there have been many strong Maori leaders, but there is no suggestion that any rangatira ever had, or sought, the kind of authoritarian and absolute power associated with a pharaoh, a Montezuma, a Ceaucescu, or any other human despot. Similarly, there has always been dynamism in the relative authority between the levels of tribal organisation of family/sub-tribe/tribe (whanau/hapu/iwi). Those tensions continue to this day and no tribal leader can claim the right to trump totally, let alone extinguish, the authority/rangatiratanga of a constituent hapu.

If tribal governance has always been limited and contestable in relation to its own followers, it follows that the degrees of autonomy and power that any tribe might have in relation to any external competitor were (and are) similarly qualified. The pursuit of mana (here: authority) in the Maori world is a nice parallel to the competitiveness of the wider political and economic world. None of this is to suggest that in particular respects (eg, rights to customary fishing in a given locality) a Maori tribe might not have greater rights than any other competitor (flowing from the status of tangata whenua).

In short, there should be no suggestion the nation is confronting some clash of absolutes: *either* (a supposedly Pakeha or even 'foreign') Parliament is 'sovereign', all-powerful, in-charge, *or* Maori institutions of some sort are 'sovereign', all-powerful, in-charge... Faced with the *irresistible-force versus immovable-object* trap, most people instinctively refuse to accept it, as they should. Fundamentally, there is no standoff here between overall governance (article 1 of the Treaty) and Maori tribal governance (article 2). The constitution reflects instead relative degrees of power - as well as relative degrees of autonomy. Such logic does not of course mean that some powers might not wax and wane over time, as they have always done.

Changing times and limits

To a historian, it would be obvious that the limits on any notion of power, including majority rule and self-determination, are not fixed in stone but are negotiated in different ways as circumstances change. The real questions, therefore, concern the processes in any society for determining and balancing the limits.

In relation to self-determination, what seems inconceivable at one point in time may become commonplace at another. With hindsight one can be simply baffled at the apparent stupidity that sent people to war. In this century, the phenomenon of an expanded European Union will remove the potential for internal wars – this in a continent where throughout recorded history, issues of self determination and dominance sparked massive conflict, culminating in two World Wars. And all those everlasting empires long broken into smaller bits (Central American, African, European, Russian, Asian) seem like fables from the Lord of the Rings, not places where so often the unity forged by blood, steel and lead was destroyed by the same means.

In Maori terms, tradition tells broadly of origin myths from the Gods (with some nice parallels with Greek and Roman mythology) and their own struggles for dominance and autonomy. In the movement out of Polynesia, the pattern is of early canoe migrations to these islands, followed by the establishment of tribes and then centuries of flux in which tribes branched and sub-branched and sometimes merged and re-merged. The pursuit of mana has been described as a core motivating aspect of Maori culture – and that pursuit would have seen constant fluctuation in the standing of any particular group (or individual).

If accurate, it is hard to exaggerate the importance of this in the context of New Zealand's constitutional system as argued above. If government-by-consent is at the heart what New Zealand does, and if every Maori group sees the possibility of negotiating its way to increase the mana of the individual or group, then there is a very busy period ahead. But none of this is a threat to the constitutional system – just the contrary, it is a confirmation of its health.

As New Zealand struggles with the apparent difficulty of reaching any single, durable, constitutional solution to the question of the place of the Treaty in New Zealand governance, the key is therefore to see all

governance, including Maori self-governance, as a framework for negotiation within limits. Put simply, and shorn of the mysticism of 'the Crown', the issues involve the relationships between peoples in a state, and between central and Maori spheres of governance.

However hard any particular group (a hapu, Maori in general, or any others such as farmers, workers, the poor, families, battlers, the rich, the creators of wealth) tries to insist upon its distinctiveness to justify its particular claim to maximise its 'rights', in the end this is all negotiation within a kiwi democracy.

This is not to reduce Maori under the Treaty to exactly the same status as other bargainers in other phases of government-by-consent. The fact of the Treaty, and more particularly the importance (even reverence) attached to it by Maori, does confer a distinctive character on the Maori dialogue with government. This goes to the heart of the social contract that is our democracy. This has been increasingly recognised, and more widely accepted by all citizens. The history of colonisation, including a domestic war, means that the nature of the Maori negotiation will always be unique within New Zealand.

Despite all this distinctiveness, Maori nonetheless are just part of the normal negotiation process in this democracy – players amongst many, bargainers amongst many (including each other). The partners to the entire New Zealand social contract need each other, as it were, to keep reaffirming basic aspects of the rule of law and the authority of elected parliaments. And Maori and the other communities particularly need each other – because they cannot back away from the history of human settlement in Aotearoa New Zealand, and also because their futures are linked increasingly by intermarriage, whakapapa and all the elements of a shared national identity. That particular die was cast even before the Treaty came into being.

The simplicity of the view of Maori as distinctive, but nonetheless 'amongst many' players in a negotiating democracy, might disappoint some. But for most it should be comforting, especially for those who hear echoes, in the occasional strident voice, of repression-resistance from other times in this country, as well as from other struggles abroad. Fears that we might again be approaching a time when violence could erupt are not without all possibility,

though much is arguably tabloid journalism and political opportunism. There is no real evidence to suggest that the sky is about to fall in.

Indeed, events in 2004 produced for many in New Zealand a sense that in negotiating how far resistance might go, the country peered over the edge of our current flexible political structures – saw an unhappy alternative, and quietly pulled back. Thus, in the biggest Maori protest march ever seen in New Zealand (the hikoi to protest against the government's seabed and foreshore policy) the atmosphere was festive and colourful, the crowd mixed, behaviour was orderly and lawful, the speeches were fiery but faced down by government ministers who sat safely, unprotected and unharmed in front of tens of thousands of protesters... That night, there were no riots, no attacks, no burning tires. Parliament continued sitting peacefully. The next day, one had the sense that a party had come to town. The protest was thus not a threat to democracy and the rule of law, but an affirmation of both: a strong and vocal challenge to government policy, true, but negotiation within a peaceful, political, distinctively Aotearoa New Zealand framework.

Tino rangatiratanga

The Waitangi Tribunal was established in 1975, first to hear Maori claims that the Treaty of Waitangi was not being honoured in current government policy and action. Then, in 1985, its jurisdiction was extended to hear Maori claims that the Treaty had not been honoured from its signing in 1840, to current times. Adding the historical jurisdiction was a breathtaking move, exposing the country to a searching re-examination of its entire history after colonisation. Few countries could comfortably re-examine the last century and a half through modern eyes. So far as I am aware, there is no exact precedent.

The political judgement that New Zealand should re-examine in detail the hurts of the past in order to build a stronger nation was therefore made 20 years ago. My metaphor is that the country is 'in the gorge' downstream from that decision; there is little option but to paddle on an even keel as steadily as possible, to calmer waters further down the river. However, the way in which the process has evolved, and the way it will develop from now on, has profound implications for the way in which contemporary

issues are negotiated and debated through the political system.

This is particularly so for the relationship between the key articles of the Treaty. Much writing has been devoted to the significance of differences between the Maori and English texts and this is not the place to re-examine those issues. For this paper, a sufficient summary is that Article 1 establishes the authority of central government; Article 2 preserves Maori land, forests, fisheries, other valued resources and tribal governance to themselves, and establishes that if land is to be sold voluntarily, it must be sold to the government; and Article 3 states in essence that Maori will have the same rights as non-Maori. Unsurprisingly, almost all claims are based on Article 2.

The key point is that in either language, this is an explicit social contract and agreement on governance. There is agreement that there will be a central process of government, of which Maori will be a part. At the same time, Maori will retain self-government and their assets, as long as they wish. On one level, this social contract simply reflected English statute and common law, which at least since Magna Carta in 1215 has provided a protection of private custom and property within the overall umbrella of monarchical-parliamentary rule.

The words are of course important, but the statutory requirement is that the Tribunal apply the Treaty "principles" in deciding if there has been compliance. Herein lies considerable scope for measuring historical actions against principle – especially notions of good faith, or equal partnership. The Reports of the Tribunal contain a wealth of information on New Zealand's history, and are increasingly themselves the object of analysis and historical scholarship. In relation to the historical jurisdiction, a claim process solely to hear Maori complaints about governments' compliance over one hundred and fifty years has (predictably, given a history of colonisation and war) found overwhelmingly in favour of Maori claimants.

There has however been a growing concern that the Tribunal has been unable to escape the danger of "presentism", i.e. seeing history through today's eyes, standards and judgements. This suggests that its role requires careful thought, if for no other reason than

that the credibility of the whole process is at risk. But in the meanwhile, the inevitable result has been to alter the conditions under which New Zealand's government-by-consent negotiation process is taking place. The Tribunal has created a situation in which the balance has shifted in favour of Maori, simply because it brings historical detail and contemporary awareness to the process. As a result, there is indeed a momentum of claim and negotiation across the public and private sectors, and a new economy emerging from settlements. Some will however continue to question the net benefits of this process, often described as a "Treaty industry".

A shifting political balance...

In terms of restoring balance, the political process has itself responded, especially over the last thirty years. Through the reserved seats in Parliament, Maori have long been guaranteed participation in governance and the significance of this has arguably increased since the introduction of proportional representation. The interplay here between active participation in Article 1 (national governance/kawanatanga) and Article 2 (tribal governance/rangatiratanga) is one of the more interesting aspects of the overall process.

Are the current structures of government-by-consent sufficiently flexible to cope with this burgeoning activity? Is change needed? What might be some key policy responses?

The answers must be explored in future papers and only a few points can be made here. From a policy point of view, it now seems inevitable, and necessary, that some limit will be put on the historical claims process. Otherwise, there might be no end to the process of looking backwards and reliving past wrongs. No society can cope indefinitely with the tensions that inevitably emerge from such an examination.

The issues that do require further thought include the recurring theme in virtually all of the Tribunal's Reports: its insistence that Article 2 established an ongoing "Crown" fiduciary duty to each tribe, implying that the Crown was required to ensure the cultural (and possibly economic) viability of the tribe. In the Reports, this theme emerges from the words of Article 2 and the finding of a 'principle' behind them.

The policy question that arises, therefore, is whether government can or should pre-empt much of the

criticism, by establishing criteria under which central government (including Maori) will recognise (and possibly assist) Maori groups in the management of some element of Maori self-government? A related question is whether there is any limit, time or other, to this process? Underlying all policy options is a key balance between 'rights' that call for a court-related process in determining their limits, and 'claims' where the primary issues are political, and hence for the executive/legislature to deal with.

Shorn, then, of the rhetoric of sovereignty as unlimited power, the issues are surprisingly simple. Those tribes that have received substantial settlements are today busy exercising aspects of their self-government/tino rangatiratanga through the management of assets. In many areas, tribes are exercising their own powers in closely cooperative relationship with central government. A nice and largely unknown example concerns Maori customary fishing rights, where local tribes establish their customary rules (reflecting tino rangatiratanga), and the state (kawanatanga) extends the protection of the ordinary criminal law and courts to enforce those rules as against *any person* fishing in the area.

None of this threatens either the national authority of parliament or tino rangatiratanga. It is an expression of both. Just as any group in New Zealand might claim and exercise some aspect of self governance (local government, clubs, societies, professions), so it is conceptually simple to create a framework for tino rangatiratanga to evolve as an explicit aspect of government policy and law. If Maori are seeking representation of their tribe in dealings with central and local government and in asset management, it is not difficult to give clarity and certainty to legal frameworks for such – indeed, it is essential, especially given the growing economic importance of tribal business.

Conclusion

If the heart of New Zealand's constitutional system is government-by-consent, then the Treaty-driven activities are part of the heartbeat. We have seen that the Treaty explicitly sets up a social contract involving both central government (in which Maori can and do participate significantly) and tribal authority/assets (which has always featured, but more so under the settlement process). As a result of the introduction of a new institution (the Tribunal) into the ongoing

process, we can also register a significant shift in the weight given by government institutions to this process.

For their part, Maori are now better resourced, better engaged, better lawyered and better politically-represented in New Zealand's democratic negotiation. This is delivering a far better crack at the negotiation than over the last 160 years. But it has limits, like everything, and most of these flow directly from the pervasive and progressive involvement of Maori in all aspects of community and society in New Zealand.

The improved position is reflected in changes which are very much in the public eye: the use of Maori language (especially in the current format of the national anthem), the linked names of "New Zealand Aotearoa" on passports (a significant international statement, although unnoticed domestically), the removal of much (but not all) of the discrimination that characterised New Zealand social and public life in the past, and the integration of a 'Maori dimension' into a great deal of government policy and law.

As the elections in 2005 approach, the appropriate response to the sustained claim for tino rangatiratanga may again loom large. The argument of this paper is that this trend is an expected, and indeed confirming, part of government-by-consent.

The real issue is therefore not about sovereignty, but about making things work. That will require us to test the limits of political acceptability to the whole society as well as to individual Maori tribes, of the amount of money it might reasonably cost, and of the mandate for the institutions that will decide these issues. Removing the conceptual blocks is the indispensable first step. All parties then need to see the mutual rewards to be derived from a unique negotiation process, which now offers a template for New Zealand democracy.

Such discussions should be seen as deepening our democracy, not threatening it. That said, there is good historical and comparative reason why the more extreme rhetoric needs to be tempered. Going outside the boundaries of peaceful negotiation, especially if real or perceived injustice is inflamed (as happened in the former Yugoslavia with the emergence of "virulent ethnic entrepreneurship") is a less promising option. It would take the current vibrant engagement down a less happy road.

Andrew Ladley has been Director of the IPS since 2003 and his interaction with many of the principal participants in the ongoing debate goes back over a longer period. In this article, he has drawn on the burgeoning literature which deals with public policy aspects of the Treaty (see select bibliography below) and on discussions with academic and legal colleagues.

Further reading:

For a full text of the Treaty and translation, see: <http://www.treatyofwaitangi.govt.nz/treaty>

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